

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALVIN B. GOBBLE

Claimant

VS.

DURHAM SCHOOL SERVICES

Respondent

AND

OLD REPUBLIC INSURANCE CO.

Insurance Carrier

Docket No. 1,049,638

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 22, 2010, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Mitchell W. Rice, of Hutchinson, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) made a finding at the preliminary hearing that claimant was engaged in multiple part-time employments that were sufficiently similar so that claimant's wages from each employment should be combined to establish a compensation rate for purposes of temporary total disability benefits. Accordingly, the ALJ ordered respondent to pay claimant temporary total disability benefits for the period from May 6, 2010, until July 22, 2010, at the weekly rate of \$239.48.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 22, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant was eligible to have the wages from his job with respondent combined with the wages from his part-time job at

J. R. Trucking Logistics (J. R. Trucking) for purposes of calculating his preinjury average weekly wage. Respondent admits there were no compensability issues raised at the preliminary hearing but argues that Board review is appropriate because the ALJ's order implicitly found that claimant's accidental injury arose out of multiple employments. Respondent contends K.S.A. 2009 Supp. 44-511(b)(7) does not apply to traumatic injuries sustained in the course of employment with a single employer. In the event the Board finds that claimant's injury arose out of multiple employments, respondent asserts that the employments are too dissimilar to allow a combination of claimant's average weekly wages.

Claimant has not filed a brief in this appeal. At the preliminary hearing, claimant argued that K.S.A. 2009 Supp. 44-511(b)(7) entitles him to combine his average weekly wages from respondent and J. R. Trucking. He further argued that the two employments were the same or similar.

The issue for the Board's review is:

(1) Does the Board have jurisdiction over the issue in this appeal from a preliminary hearing?

(2) If so, was claimant entitled to have the wages from his two part-time employments combined pursuant to K.S.A. 2009 Supp. 44-511(b)(7) for purposes of computing his compensation rate for temporary total disability benefits?

FINDINGS OF FACT

Claimant worked part time for respondent as a school bus driver. He described his duties as doing a pre-road and post service examination of the bus, picking up and transporting children, maintaining order on the bus, and cleaning the bus. On November 17, 2009, claimant was exiting a bus and fell down the steps to the ground, injuring his feet, left hip, right shoulder, and neck.

At the time of his injury, claimant was also working part time for J. R. Trucking. He said that he would pick up a large cargo truck at a truck stop at Hutchinson and drive it to the Colorado border, where he would meet another individual, and they would trade trucks. Claimant would then drive the second truck back to Hutchinson. Claimant said his first day at J. R. Trucking was November 1, 2009, and the last day he drove for J. R. Trucking was November 15, 2009. Claimant said he terminated his position with J. R. Trucking on November 18, 2009, the day after this accident, because of his injuries.

Claimant said he needed a CDL for both his job with respondent and his job with J. R. Trucking. In driving a school bus, claimant would transport a varying number of passengers and was required to check the loading and unloading of passengers, including handicapped passengers. He said on one occasion while driving for J. R. Trucking he had

two passengers, but the rest of the time he drove alone. He said that he had no loading or unloading responsibilities at J. R. Trucking but had to check to be sure tie lines and guidelines were secure.

The parties agreed that claimant's average weekly wage while working at respondent was \$34.67. The ALJ found that claimant's average weekly wage while working for J. R. Trucking to be \$324.23. These combined for a total average weekly wage of \$359.20, which computes to a compensation rate of \$239.48.¹

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

In *Allen*,² the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and

¹ P.H. Trans. at 52.

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.³

K.S.A. 2009 Supp. 44-511(b)(7) states:

(7) The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁵

ANALYSIS AND CONCLUSION

The Board is without jurisdiction to review this appeal from a preliminary hearing order. Respondent admits there were no compensability issues raised at the preliminary hearing.⁶ Whether the ALJ erred in combining claimant's earnings from his two part time employments for purposes of calculating claimant's gross average weekly wage and compensation rate is not a jurisdictional issue. J. R. Trucking is not a party to this claim. Neither claimant nor respondent is alleging that claimant was injured while working for J. R. Trucking. That employment is relevant only for purposes of calculating claimant's average weekly wage under K.S.A. 2009 Supp. 44-511. Moreover, K.S.A. 44-534a makes the issue of whether claimant's injury arose out of and in the course of the claimant's employment with respondent a jurisdictional issue. The statute does not include the issue

³See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁴ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁵ K.S.A. 2009 Supp. 44-555c(k).

⁶ Respondent's Brief at 4 (filed August 16, 2010).

of whether claimant's injury may have also arisen out of another employment or out of multiple employments. There is no dispute that claimant's injury arose out of and in the course of his employment with respondent. Therefore, the Board is without jurisdiction at this juncture of the proceedings to decide the issue raised by respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the appeal from the Order of Administrative Law Judge Bruce E. Moore dated July 22, 2010, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of September, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge